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SENSITIVE
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STATE PASS USTR FOR EVERETT EISSENSTAT, KATE KALUTKIEWICZ
STATE FOR WHA AND EEB
USDA FOR FAS RIEMENSCHNEIDER, BLUM, HIGGISTON

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SUBJECT: BRAZIL: USTR/MRE BCM POSITIVE AND PRODUCTIVE

REF: 2009 BRASILIA 1129; 2009 BRASILIA 1385; 2009 BRASILIA 1042
2009 BRASILIA 1175; 2009 BRASILIA 1338

¶1. (SBU) SUMMARY: On December 9, Assistant United States Trade Representative (AUSTR) for the Americas Everett Eissenstat, accompanied by Director for Brazil and Southern Cone Katherine Kalutkiewicz, led the U.S. delegation during a positive and productive meeting of the Bilateral Consultative Mechanism (BCM). Carlos Marcio Cozendey, Director of the Ministry of Exterior Relations' (MRE) Economic Department, led the Brazilian delegation. Throughout a wide-ranging agenda, both sides expressed eagerness to engage on tangible bilateral cooperation and agreed to exchange drafts of a framework agreement for trade and investment by the end of January 2010. In discussing difficult issues, the U.S. and Brazilian delegations exchanged viewpoints constructively and emphasized that areas of disagreement should not define the overall bilateral relationship. END SUMMARY.

BCM: POSITIVE AND PRODUCTIVE

¶2. (SBU) In a private meeting before the start of the BCM, Under Secretary for Economic and Technological Affairs Pedro Mendonca told AUSTR Eissenstat that Brazil is glad for the opportunity presented by the BCM to discuss issues frankly. AUSTR Eissenstat emphasized the U.S. commitment to the BCM and repeated the desire of U.S. Trade Representative (USTR) Ambassador Ron Kirk (expressed in a September 2009 visit to Brazil - ref A) that all bilateral trade dialogues become more goal-oriented, concrete, and robust.

¶3. (SBU) Ambassador Mendonca said Brazil bears "no hard feelings" toward the United States on the issue of the WTO cotton dispute and is "looking for a way out." AUSTR Eissenstat urged U/S Mendonca to communicate frankly as Brazil goes through its internal process of deciding on retaliation measures and to consider the dangers of inflexibility. Both agreed that the United States and Brazil should manage the cotton dispute in the context of the overall bilateral relationship.

Agenda Item: Institutional Framework of Trade Relations

¶4. (SBU) Following up on a suggestion made by Ambassador Kirk in his September 2009 visit to Brazil, the Brazilian delegation expressed interest in establishing a more stable framework for trade relations with the United States. Minister Cozendey said that Brazil had examined some similar U.S. agreements, some of which were general in tone, while others included specific programs of work. He asked what characteristics and level of detail the United States envisioned for a U.S.-Brazil framework.

¶5. (SBU) AUSTR Eissenstat said that he would consult with others in the USG but that he thinks the framework should be broad, allowing the specific workplan to develop in line with changing political and economic objectives. He cited similar Brazilian agreements with Turkey and Switzerland and the United States' agreement with Uruguay as examples where the agreements have broad objectives and work plans that can meet changing needs and priorities.

¶6. (SBU) Minister Cozendey explained that anything called an "agreement" must be approved by the Brazilian Congress and indicated that an executive branch mechanism without the term "agreement" would not require Congressional approval. AUSTR Eissenstat explained that Trade and Investment Framework Agreements (TIFAs) do not require approval by the United States Congress and said the United States can be flexible on the name and terms for developing a framework, as well as on the timeframe.

¶7. (SBU) Minister Cozendey said he would seek approval from the Brazilian External Trade Chamber (CAMEX) at a meeting during the week of December 14 and forward a draft framework to USTR by the end of January or beginning of February 2010. AUSTR Eissenstat committed that USTR would also work to develop ideas and would be available for further technical discussions if desired. He later explained that the USG would be developing a proposed draft text during this period as well.

Agenda Item: Investment Policy

¶8. (SBU) AUSTR Eissenstat expressed the United States' continued interest in a Bilateral Investment Treaty (BIT) with Brazil. Minister Cozendey observed that interest in a BIT is growing as Brazilian investment overseas grows. He cautioned, however, that the Brazilian government's view is that a BIT with the United States continues to have policy difficulties, specifically mentioning a difference of opinion on international arbitration. He recalled that in the 1990s, Brazil signed some agreements which had difficulty gaining Congressional approval. MRE decided not to pursue those agreements because they found the existing Brazilian legal framework very stable and sufficiently safe for investors. More recently, he said, there had been some discussion about a new BIT model, and Brazil has begun discussions with Chile utilizing the new model. Minister Cozendey said that any future Brazil BIT would not be based on the traditional Organization for Economic Cooperation and Development (OECD) model, since Brazil sees problems with that model including an absence of guarantees that measures such as direct expropriation would not be misused.

¶9. (SBU) In response to Minister Cozendey's question about the progress of the U.S. BIT review, AUSTR Eissenstat said that an internal U.S. review of investment policy principles may be done by the end of the year. Minister Cozendey

and AUSTR Eissenstat noted that other bilateral dialogues such as the CEO Forum have endorsed the concept of an investment treaty, and agreed that it was worthwhile to continue discussing the issue at a technical level, noting that experts were scheduled to meet alongside the December 14 meeting of the Economic Partnership Dialogue (EPD) in Washington.

¶10. (SBU) Minister Cozendey indicated his interest in investment promotion. AUSTR Eissenstat suggested looking for ways to include invest promotion in existing mechanisms. He committed to coordinate with the Department of Commerce to investigate whether this would fit into the CEO Forum dialogue.

Agenda Item: Bilateral Trade and Investments

¶11. (SBU) Minister Cozendey expressed Brazil's disappointment in the diminishing overall volume of trade between the United States and Brazil. He said exports up to November 2009 had decreased 45% and imports decreased 29% compared to 2008. He said Brazil understands that the overall volume of trade and Brazil's current trade deficit with the United States is likely a consequence of the international financial crisis and strong

currency and is not expected to be permanent. However, he said, it is concerning that these effects seem to be different from those in other countries, and the role of the U.S. as a trading partner had decreased in relation to others. Marcela Carvalho, International Affairs Advisor for the Ministry of Development, Industry, and Commerce (MDIC), explained that overall Brazilian trade has decreased 30%, but trade with the United States has decreased 45%.

¶12. (SBU) Minister Cozendey said the Brazilian short-hand for describing trade categorizes trading partners into "the United States, the European Union, Latin America, China, and all the others." He said that Brazil worries when U.S. trade decreases because it is mostly trade in manufactured goods which results in Brazil's overall composition of exports heavy on raw material (traded, for example, with China). He emphasized that the concern is not with the country's current trade deficit but rather with the overall reduction in trade.

¶13. (SBU) AUSTR Eissenstat, noting that there seems to be a shift in the U.S. economy toward more saving and less consumption, indicated that there seems to be the potential for substantial growth in bilateral trade for both economies and said it could be valuable to examine the data more in depth to potentially identify regions and products that are underdeveloped in the bilateral trade relationship. According to AUSTR Eissenstat it may be possible to build on significant advances in trade between Brazil and the United States, for example by determining if any sectors are under-represented.

Agenda Item: WTO and Doha

¶14. (SBU) Minister Cozendey said Brazil is not optimistic about the prospects for the Doha Round. While many countries say they are engaged and invested in reaching a positive conclusion, he said, there has been little progress. He said the United States is the only country that objects to the text agreed

on in November 2008 and that Brazil is in a difficult position since the United States is asking for more concessions from Brazil, Russia, India, and China. He asked the United States to narrow its list of priorities, though he admitted Brazil has a general idea of the U.S. goals and simply finds the priorities unacceptable. Minister Cozendey also said that delays in concluding the round have already undermined the credibility of the World Trade Organization (WTO) and have led to loss of interest among some Brazilian ministries and private sector representatives. He pointed out that attention to the Round will be even more difficult to sustain as the country heads into the 2010 election cycle.

¶15. (SBU) While AUSTR Eissenstat is not the primary spokesperson on this issue, he said he would convey the Brazilian concerns to the appropriate representative. He said the United States appreciates the effort so far on the Doha round but that the USG requires more meaningful market access guarantees. Without that, he said, an agreement could actually be detrimental. He said he does not know what would be required to reach consensus but that he understands the potential impact of the Brazilian election cycle and would take that message back to Washington.

Agenda Item: WTO Dispute Settlement

¶16. (SBU) On orange juice, Minister Cozendey said that Brazil is now in the phase of trying to constitute a dispute panel. Both sides refused each others' nominations for panel members, and Brazil now expects arbitration on panelists to begin early next year. AUSTR Eissenstat expressed disappointment that a panel was requested. He said that Ambassador Kirk and the USTR General Counsel are very interested in working to resolve the issue and do not want continued irritants in the relationship. However, he said, the current decision by Brazil to seek the panel actually makes it more difficult for the United States to address the underlying question of zeroing. Minister Cozendey said Brazil was not at liberty to withhold the case in the face of private sector interest but would also prefer and would be happy to discuss a more general solution, rather than continuing with arbitration on a case-by-case basis.

¶17. (SBU) On cotton, Minister Cozendey explained that CAMEX published for public comment an initial list of goods that could possibly be subject to increased tariffs (a decision that does not require Congressional approval, since the Brazilian executive branch has the authority to define tariffs) and is currently analyzing approximately 450 comments received. CAMEX expects to finish its technical analysis (which Minister Cozendey said will not be publicly available) and present a refined list for ministerial decision by the end of January. (Note: CAMEX has now said publicly that its next meeting will be scheduled for early February, so no decision is expected before then. End note.)

¶18. (SBU) On a parallel track, CAMEX also drafted and forwarded to the Office of the President legislation authorizing cross-retaliation on intellectual property (which Minister Cozendey said will not be submitted for public comment). Minister Cozendey said that technically the WTO decision has the weight of law in Brazil, so legislation authorizing cross-retaliation is not strictly required. However, CAMEX decided to draft the legislation in order to ensure judicial clarity on this very delicate issue. MRE recommends that the President's office send the draft legislation to Congress as a provisional measure (which would take effect immediately and then be subject to Congressional review) by the end of January so that Brazil could implement both the tariffs

and the cross-retaliation portion simultaneously (the exact effective date would have to be decided by CAMEX ministers) and "minimize uncertainty for business."

¶119. (SBU) Minister Cozendey said Brazil's objective is to see that the recommendations of the Dispute Settlement Body (DSB) are implemented (both on subsidies and guarantees) and that Brazil would prefer compliance to retaliation. He explained that Brazil intends to chose measures it views as reversible and would lift any retaliation as soon as the United States complies with the DSB recommendations. He said it is likely Brazil will have some form of retaliation in place by the end of January (and will base the 2010 retaliation value on 2008 data provided by the United States, since 2009 data is not yet available).

¶120. (SBU) AUSTR Eissenstat asked that Brazil continue to work closely with the United States and guard against unintended or unpredictable consequences. He emphasized that the U.S. Congress has its own process and priorities, but USTR wants to manage this "potentially corrosive" issue such that the relationship can still grow in the long term.

Agenda Item: Trade Facilitation

¶121. (SBU) Minister Cozendey said CAMEX is looking for ways to simplify trade and is very interested in ongoing cooperation on trade facilitation. AUSTR Eissenstat suggested the topic as part of the work plan under the new framework agreement.

¶122. Calling the Department of Homeland Security's Customs-Trade Partnership Against Terrorism (C-TPAT) a valuable mechanism, Minister Cozendey said that Brazil nonetheless has difficulty with some requirements like 100% scanning. Embassy Brasilia's Commercial Attaché passed to the Brazilian delegation a fact sheet on C-TPAT and highlighted several recent and successful meetings and visits on trade facilitation. She also asked the Brazilian delegation to clarify recent visa refusals for C-TPAT inspectors, which she said hurt Brazilian exporters.

¶123. (SBU) Minister Cozendey said MRE recognizes the importance of C-TPAT and would like to continue to discuss the issue at the EPD. The immediate solution to the visa problem, he said, is for inspectors to specify trade facilitation rather than anti-terrorism activities on their visa applications so that the applications are channeled to the appropriate MRE division.

Agenda Item: GSP Renewal

¶124. (SBU) Minister Cozendey registered MRE's interest in renewal of the Generalized System of Preferences (GSP) program and asked about Brazil's prospects for continued inclusion. He argued that loss of GSP status would further inhibit bilateral trade flows and said some regions in Brazil use the GSP program as an important opportunity to engage in trade with the United States. He also argued that withdrawing Brazil's GSP status would only benefit other advanced developing economies since lesser-developed countries do not produce the goods that would be needed to fill the space left by Brazil. AUSTR Eissenstat described the short-term prospects for GSP renewal as good but said the program will probably be subject to broad reform in 2010. Given the U.S.

Congress' interest in ensuring that the program apply only to the most needy countries, AUSTR Eissenstat asked Brazil to provide more data on the benefit of GSP inclusion for particular Brazilian products and regions (for example, the under-developed North and Northeast).

Agenda Item: Preferential Regime for Haiti

¶25. (SBU) Minister Cozendey explained that the Brazilian government is still pursuing a unilateral preference program for Haiti that is similar to the HOPE II program. Minister Cozendey explained that the Brazilian private sector is discussing a proposal that would include reciprocity with HOPE II that should be presented to CAMEX early in 2010. MRE sees some opportunities in the current formulation of the HOPE II preferential regime, but some products are excluded under the present rules. Minister Cozendey also cited some opposition from within the Brazilian textile industry in pursuing a preferential regime for Haiti, saying some have questioned assistance to Haiti rather than to under-developed domestic regions. Minister Cozendey acknowledged that the U.S. Congress would be responsible for making the sorts of changes to HOPE II that are likely to be advocated by the Brazilian private sector.

¶26. (SBU) AUSTR Eissenstat stressed the United States' shared interest in stability and economic growth for Haiti, but explained that legislative modification of the program would be very difficult. He asked Minister Cozendey whether the Brazilian private sector had spoken with the U.S. private sector as the USG had previously suggested. Cozendey noted that the Brazilian private sector had reported that a meeting of both private sectors would occur in early 2010. In addition, AUSTR Eissenstat said USTR's textile negotiator has concerns that some products being proposed for inclusion by Brazil could hurt the development of Haiti's domestic production capacity. Minister Cozendey requested further details, which AUSTR Eissenstat agreed to provide. AUSTR Eissenstat noted that there was nothing to inhibit Brazil from establishing a preferential trading regime for Haiti immediately without waiting for new legislative action by the United States.

Agenda Item: Technical Regulations and SPS Measures

--Beef and Pork

¶27. (SBU) Minister Cozendey expressed concern that the United States has not yet proposed a rule on Brazilian pork exports from Santa Catarina after a technical evaluation was completed in February 2009. He also said that the situation for Brazilian beef is even worse, since Brazil has controlled foot and mouth disease for many years and is certified by the World Organization for Animal Health (OIE).

¶28. (SBU) AUSTR Eissenstat said that the pork process is proceeding through normal rule-making channels and emphasized that technical regulations and sanitary and phytosanitary (SPS) measures should be purely science-based and not politicized. He asked whether Brazil has any draft regulations to bring the country in line with international guidelines on Bovine Spongiform

Encephalopathy (BSE) following submission of comments by the U.S. Animal and Plant Health Inspection Service (APHIS). Minister Cozendey committed to following up with the Ministry of Agriculture. He asked that USTR reach out to the U.S. Department of Agriculture in order to help schedule the next meeting of the Consultative Committee on Agriculture.

--Medical Devices

¶129. (SBU) AUSTR Eissenstat thanked the Brazilian health vigilance agency (ANVISA) for its efforts to address industry concerns, offered to work as a facilitator where helpful, and committed to helping continue ANVISA's engagement with the Food and Drug Administration (FDA). He asked for ANVISA clarification on the publication date for a promised technical note regarding Resolution 25 and continued concerns from U.S. industry regarding possible disruption of trade resulting from Resolution 25's inspection requirements. Commercial Attaché thanked ANVISA for its work thus far to answer industry concerns and suggested that another public forum could be helpful.

¶130. (SBU) Ana Paula Juc????, from the international relations office of ANVISA, said the technical note would be available on ANVISA's website by the end of December. Minister Cozendey further explained that ANVISA has scheduled most of the inspection requests for the remainder of 2009 and approximately 30 for 2010. He also said that ANVISA remains interested in increased cooperation with FDA.

--Toys

¶131. (SBU) AUSTR Eissenstat thanked Brazil for the revisions in the toy licensing regulations published in November and welcomed additional information clarifying the accreditation process, particularly regarding the samples and locations for testing. Minister Cozendey regretted that the Brazilian National Institute of Metrology, Standardization, and Industrial Quality (INMETRO) could not be present at the BCM and asked that USTR pass its questions in writing.

Agenda Item: Biofuels

¶132. (SBU) Minister Cozendey asked for an update on the administration's position regarding the ethanol tariff. He said the issue of cooperation in biofuels would be discussed at the December 15 Biofuels Steering Committee meeting in Washington but wanted to raise the tariff in the BCM because it could have consequences for cooperation on international biofuels standards and in third countries. AUSTR Eissenstat referred Minister Cozendey to the Administration's letter on ethanol written following Ambassador-designate Tom Shannon's confirmation hearing.

Agenda Item: Trade and Environment

¶133. (SBU) Minister Cozendey asked for more information regarding the content of climate-related trade legislation pending before the U.S. Congress and conveyed Brazil's interest in assuring that any measures taken comply with WTO obligations and are

discussed multilaterally. Minister Cozendey indicated that the Brazilian government was unclear about whether the draft legislation contains clear guidelines on border measures. AUSTR Eissenstat requested the questions in writing and offered to facilitate the appropriate technical contacts.

Agenda Item: Subsidies in the Pulp and Paper Industries

¶34. (SBU) Minister Cozendey inquired about "worrisome" efforts by U.S. industry to maintain the subsidies beyond their scheduled expiry in 2009, which he said would "pose a serious problem." He said that Canada had been obliged to match the U.S. subsidy but would withdraw it when the United States does. AUSTR Eissenstat said that the Obama Administration has proposed to terminate the subsidy but is aware of industry's attempts to pursue additional avenues. He asked that Brazil please contact USTR if they see new developments within industry.

Agenda Item: Subsidies for the Aircraft Sector in Third Countries

¶35. (SBU) Minister Cozendey said that Brazil is concerned about federal and provincial subsidies for the aircraft industry in Canada and hopes to meet with the United States early in 2010 to discuss the applicability of WTO rules and a possible future dispute. AUSTR Eissenstat said that USTR is reviewing the issue and would like to keep sharing information. He committed to discuss the possibility of a meeting and respond to MRE in the near future.

Agenda Item: Intellectual Property (IP)

--Brazilian National Plan for Combating Piracy

¶36. (SBU) Andre Barcellos, Executive Secretary of the Brazilian National Anti-Piracy Council (CNCP), gave a brief presentation on CNCP's history and current priority projects. The priority projects include "Cities free of piracy" (agreements were signed on December 1 with Sao Paulo and Curitiba), "Legal Markets," cooperation with internet service providers, an anti-piracy internet portal, and "Commerce against Piracy" (ref C). He agreed to supply more details on the municipal agreements. AUSTR Eissenstat said that while there is still work to undertake, the CNCP's interagency effort was to be commended, and suggested that further opportunities for cooperation on IP could perhaps be included in the previously discussed trade framework agreement.

--Google Books

¶37. (SBU) Minister Cozendey expressed great interest in the outcome of the Google Books case, particularly regarding whether Brazilian authors would be required to "opt-out" of the final settlement in order to maintain their ability to file

separate suits against Google. The U.S. Patent and Trademark Office's (USPTO) Regional IP Specialist explained that the situation is fluid, with the court currently analyzing a second draft of the proposed settlement. In response to Brazil's questions, the USPTO representative said the current draft does not require foreign authors to be covered by this settlement unless they are registered USPTO or published in Canada, Australia, or the United Kingdom.

--Orphan Works

¶38. (SBU) Minister Cozendey asked whether there was a current proposal in the U.S. Congress concerning "orphan works" and inquired about the United States' experience in cases where the rightsholder is not found. A representative from the Ministry of Culture said that Brazil does not have a tradition of registering works so no comprehensive database exists, unlike in the United States where tradition has obligated the registration of works at the USPTO. Post's Regional IP Specialist explained that that there is currently no legislation on "orphan works" pending before the U.S. Congress.

--Competition Policy and IP

¶39. (SBU) Citing the European Union's research on anti-competitive practices by brand-name pharmaceutical manufacturers and a July court filing by the U.S. Department of Justice's antitrust division regarding the unlawful nature of settlements aimed at delaying the introduction of generic drugs, Minister Cozendey asked for further updates and for the U.S. delegation to identify an appropriate competition policy contact for further discussion, which Embassy Brasilia has provided in coordination with USTR and the Federal Trade Commission.

--Patent Matters

¶40. (SBU) AUSTR Eissenstat said that U.S. industry has expressed concern about the role of ANVISA in reviewing pharmaceutical patent applications. He also asked for further information on a November opinion by the Brazilian Attorney General (AGU) which ruled that only the Brazilian patent and trademark office (INPI) is competent to review patentability requirements (ref E). Minister Cozendey said he could not clarify much as there is division within the government. The AGU opinion, which does not carry the force of law or regulation, is awaiting analysis by the Office of the President, with an unknown timetable for decision or next steps.

Agenda Item: CITEL Mutual Recognition Agreement (MRA)

¶41. (SBU) Minister Cozendey explained that the Brazilian telecommunication authority (ANATEL) has reviewed the issue and found no interest on the Brazilian side in exports and a strong interest in developing a domestic testing laboratory network. He said that while he does not expect the United States to abandon the issue, prospects are not positive, though he did propose the creation of a cooperative working group between U.S. and Brazilian regulatory agencies to maintain an open dialogue,

perhaps including exchanges between Brazilian and United States labs.

Agenda Item: Pre-Salt Legislation

¶42. (SBU) AUSTR Eissenstat said that the USG has been hearing from many stakeholders concerned about the lack of a transparent regime that maximizes the opportunities for development. Eissenstat said the United States is concerned about this issue from an investment standpoint, but also has concerns that Brazil may not be able to adequately meet its own goals. Andre do Lago, Director of MRE's Energy Department, said it is lucky for Brazil that it discovered oil now, when it has an established democracy and strong institutions. He said that the proposed legislation attempts to address fears regarding the negative consequences that "out of control exploitation" of the pre-salt oil reserves could provoke. Minister do Lago acknowledged that Petrobras alone cannot meet its goal of investing funds equivalent to its own value over the next five years and that Brazil will need large investments of capital and equipment to exploit the oil reserves. He acknowledged that the final law will likely provide preferences for Brazilian inputs, but noted the need for flexibility in case the Brazilian private sector is unable to meet all of the needs. Some segments of the population are more "nationalistic" than others, he said, but he is confident they will reach the right balance.

COMMENT

¶43. (SBU) The commitment of both Brazil and the United States to begin work on a framework agreement for trade and investment early in 2010 represents a significant achievement. The framework can make the bilateral trade dialogue more concrete and goal-oriented, while also moving away from disputes and toward results. The overall tone of cooperation during the BCM, even on difficult topics, represents a positive shift from prior, more confrontational meetings, one that will be very helpful in progressing on many issues. END COMMENT.

¶44. This message has been cleared by USTR.
KUBISKE